Fair Up or Down Vote

May 20, 2005

Noteworthy

- Senate Filled up with Filibusters, Amarillo Globe News, 5/20/05

"The current tactic of withholding a vote on a president's judicial nominations is an unprecedented rejection of Senate tradition. The claim that the Senate filibuster of judicial nominees has been an accepted parliamentary tactic is plainly false; an overt distortion of the Senate's responsibility to give the president advice and consent on his nominees." Excerpt from Letter signed by 5 former Senators
Full Text of Letter from Senators Buckley, Gorton, Laxalt, Miller, and Thompson

"Senators on both sides of the aisle have firmly stated in the past that judicial nominees should never be defeated by a filibuster. And legal scholars across the political spectrum have long concluded what we in this body know instinctively – that to change the rules of confirmation as a partisan minority has done, badly politicizes the judiciary and hands over control of the judiciary to special interest groups." **Senator Cornyn**, Floor Speech, 5/20/05
Full Text of Senator Cornyn's Floor Speech

"I have said, as I did two years ago, regardless of who is president, I will never vote to filibuster that president's judicial nominees." **Senator Alexander**, Floor Speech, 5/20/05
Full Text of Senator Alexander's Floor Speech

Editorial: Senate filled up with filibusters

AMARILLO GLOBE NEWS
http://www.amarillo.com/stories/052005/opi_1963381.shtml

Schumer assertion is empty claim

Democratic U.S. Sen. Charles Schumer of New York told only part of the story during the opening of debate on whether a Texas judge should take her seat on the 5th U.S. Court of Appeals.

The Constitution, Schumer said, doesn't require the Senate to be a "rubber stamp" for presidential nominations. The filibuster procedure, he said, allows senators to avoid marching "like lemmings" behind every nominee the president puts forth.

An up-or-down vote, though, provides sufficient checks and balances if enough senators want to send a nomination down in flames.

Texas Supreme Court Justice Priscilla Owen, whom President Bush has chosen for the federal appellate post, is on the senatorial hot seat at the moment. Senators opened debate Wednesday on her nomination. At stake, though, is the future of the filibuster, a time-honored tradition used to block legislation or, in this case, nominees to the federal bench.

Owen deserves, however, to have the full Senate vote on her nomination. It's what Bush wants. It's what Senate Majority Leader Bill Frist, R-Tenn., wants. It's what most senators want.

The problem, though, is that the 60-vote rule to stop a filibuster is prohibiting a full Senate vote. Frist is considering whether to ask for a ruling to allow a simple majority of 51 votes to end a filibuster. If all 100 senators were to vote and then reject the nomination, that is one thing. For a minority of senators to stop even a full vote isn't fair to the courts, the legislative process or to the president whose re-election in 2004 gives him the right to appoint judges to fill key vacancies.

The Senate's role of "advise and consent" isn't compromised if senators give judicial nominees the common courtesy of an up-or-down vote.

Schumer's assertion that the filibuster is the only way to protect "minority rights" in the Senate is just plain false.

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May 20, 2005

Senator Bill Frist, M.D.
Majority Leader
S-230, The Capitol
Washington, DC 20510

Senator Harry Reid
Democratic Leader
S-221, The Capitol
Washington, DC 20510

Dear Senator Frist and Senator Reid:

For 214 years, the United States Senate has been referred to as the “World’s Greatest Deliberative Body.” Since before any of us served in this hallowed chamber, it was a bastion of civility, dignity, honor and respect.

And though we may have disagreed on public policy, members always recognized that the Senate must preserve its bipartisan pedigree. That is why it is so disturbing to us that current members of the Senate have not been able to resolve the current debate over judicial nominations. Just as troubling, we regret that the chamber’s debate has

degenerated into a series of partisan attacks, grounded in willfully disingenuous and misleading justifications for delaying and denying votes on judicial nominations.

The current tactic of withholding a vote on a president's judicial nominations is an unprecedented rejection of Senate tradition. The claim that the Senate filibuster of judicial nominees has been an accepted parliamentary tactic is plainly false; an overt distortion of the Senate's responsibility to give the president advice and consent on his nominees.

The constitutional option is not the ideal way of guaranteeing that the president's judicial nominees receive the votes they deserve. However, barring the minority's willingness to restore 214 years of precedent and tradition, it is a far better option than allowing the minority to hijack the chamber and deny the Senate the opportunity to fulfill its constitutional obligations.

The Senate must be allowed to function in a way that allows it to fulfill its constitutional obligations to the country. Denying votes on these nominees not only forces the Senate to abandon its duties, but tears at the very fabric of our great republic.

Sincerely,

Fmr. Senator James Buckley
Fmr. Senator Slade Gorton
Fmr. Senator Zell Miller
Fmr. Senator Paul Laxalt
Fmr. Senator Fred Thompson

# # #

Senator Cornyn's Floor Speech
5/20/05

Mr. President, for the last three days – actually, for the last four years – we've debated three key questions on the floor of the Senate.

Those questions are:

First: do nominees like Justice Priscilla Owen deserve confirmation to the federal bench – or, at minimum – do they at least deserve an up-or-down vote?

Second: is this new idea of a supermajority requirement for the confirmation of judges both unprecedented – and wrong?

Third: is the use of the Byrd option appropriate in order to restore Senate tradition to the confirmation of judges, and to ensure that the rules remain the same, regardless of which party controls the White House and which party has a majority in the Senate?

I firmly believe that the case has been made, and the answer to each of these questions is YES.

* * *

First: do nominees like Justice Priscilla Owen deserve confirmation to the federal bench – or, at minimum – do they at least deserve an up-or-down vote?

Of course they do.

I know Priscilla Owen personally, because we served together on the Texas Supreme Court. She is a distinguished jurist and public servant, who has excelled in virtually everything she has ever done.

There are those who oppose Justice Owen's nomination. That is their right.

Some Senators have criticized some of her rulings. Others, including myself, have defended those rulings.

The debate has been extensive, and Justice Owen's record has prevailed.

Indeed, it is precisely *because* Justice Owen's record is so strong, that a partisan minority of senators now insists that Owen may not be confirmed without the support of a supermajority of 60 senators – a demand that is, by their own admission, wholly unprecedented in Senate history. Why? Simple: The case for opposing her is so weak that changing the rules is the only way they can defeat her nomination.

What's more, they know it. Before her nomination became caught up in partisan special-interest politics, the top Democrat on the Judiciary Committee predicted that Owen would be swiftly confirmed. On the day of the announcement of the first group of nominees, including Owen, he said he was "encouraged" and that "I know them well enough that I would assume they'll go through all right." And just a few weeks ago, the Minority Leader announced that Senate Democrats would give Justice Owen an up-or-down vote — albeit only if Republicans agreed to deny the same courtesy to other nominees.

These concessions are understandable, because the case against Owen is unconvincing.

The American people know a controversial ruling when they see one – whether it's the redefinition of marriage, or the expulsion of the Pledge of Allegiance and other expressions of faith from the public square – whether it's the elimination of the three-strikes-and-you're out law and other penalties against convicted criminals, or the forced removal of military recruiters from college campuses. Justice Owen's rulings fall nowhere near this category of cases. There is a world of difference between struggling to

interpret the ambiguous expressions of a legislature, and refusing to obey a legislature's directives altogether.

* * *

Second: is this new idea of a supermajority requirement for the confirmation of judges unprecedented – and wrong?

The answer is simple: yes and yes. Indeed, our colleagues across the aisle have said so in the past, time and time again.

Unprecedented? Of course it is. President after President after President have gotten their judicial nominees confirmed by a majority vote – not a supermajority vote. Indeed, by their own admission, Justice Owen's opponents in this body are using "UNPRECEDENTED" tactics to block her nomination. A leading Democrat Senator has boasted of their "UNPRECEDENTED" tactics to Democrat donors.

Wrong? Of course it is. Senators on both sides of the aisle have firmly stated in the past that judicial nominees should never be defeated by a filibuster. And legal scholars across the political spectrum have long concluded what we in this body know instinctively – that to change the rules of confirmation as a partisan minority has done, badly politicizes the judiciary and hands over control of the judiciary to special interest groups.

* * *

Finally, is the use of the Byrd option appropriate in order to restore Senate tradition to the confirmation of judges, to ensure that the rules remain the same, regardless of which party controls the White House and which party has a majority in the Senate?

Of course it is. It's called the "Byrd" option precisely because the former Democrat Majority Leader has exercised this authority, on behalf of a majority of Senators, on numerous occasions throughout history.

It's precisely why the former Democrat Majority Leader boasted just ten years ago on the floor of this body of how, and I quote, "I have seen filibusters. I have helped to break them. . . . And the filibuster was broken--back, neck, legs, arms. It went away in 12 hours. So I know something about filibusters. I helped to set a great many of the precedents that are in the books here." The Senator from Massachusetts and the Senator from New York have similarly recognized the authority of a majority of Senators to establish precedents.

* * *

Over the last three days, a number of Senators, on both sides of the aisle, have taken to the floor of this body to offer their answers to these three central questions. There have been disagreements, but I hope that they have been respectful disagreements.

It has been suggested by some that we are facing a constitutional crisis. I beg to differ. America is strong. Our constitutional system works. It is perfectly normal and traditional for Senators to debate, to disagree, and then to vote. And it is certainly perfectly normal and traditional for a majority of Senators to vote on the rules and parliamentary precedents of this body. Senators have been doing that from time immemorial.

There is nothing radical about Senators debating the need to confirm well qualified judicial nominees. There is nothing radical about a majority of Senators voting to confirm judicial nominees. And there is nothing radical about a majority of Senators voting to establish Senate precedents and rules.

In short, what we have on the floor of the United States Senate right now is **a controversy –***not a crisis*. The controversy can be resolved as it has always been resolved – by an up-or-down vote of the United States Senate. The controversy can be resolved as it has always been resolved – by simply determining which side of a question enjoys the support of a greater number of Senators. And once the controversy is resolved, we can – and we should – get back to the rest of the people's business. This is a controversy, but not a crisis. And I hope that, in the coming days, we will complete our debate and resolve the controversy in a respectful manner, consistent with the greatest traditions of the United States Senate.

# # #

Floor remarks of U.S. Senator Lamar Alexander on the judicial nomination process
May 20, 2005

Mr. President, the issue before us is pretty simple. It is this: shall we continue the two-century tradition of voting up or down each president's judicial nominations? That is it. That is all we are talking about.

Making your way through all the histrionics -- and there have been a lot of them on both sides -- that is absolutely all we are talking about. Shall we continue the two-century tradition of voting up or down, eventually, on this president's or any president's judicial nominees?

The Democrats have decided they will use the Senate rules to prevent an up-and-down vote on some of President Bush's judicial nominees by using this as a consistent tactic for the last two years to block a vote on nominees a majority of us want to confirm. They are using the Senate rules in a way they have never before been used. They know that. Everyone knows that. There is no disputing that. They had a meeting. They decided to do it. And they are doing it.

Now, they may have past grievances such as the practice used by both parties to allow a single senator to block a nominee in a committee. I know all about that grievance. In 1991, the first President Bush nominated me to be the U.S. Education Secretary. I was

enthusiastic about it. I had been the governor of my state. I was president of the University of Tennessee. I came up and sold my house, moved my family up, put my kids into school, and then one senator from Ohio put a hold on my nomination. So I sat there in the committee for about three months, not even knowing who it was, or knowing what the problem was.

After a while, that senator, who happened to be a Democrat -- they were in the majority then -- said in a public hearing with me: “Governor Alexander, we have heard some disturbing things about you, but I don't want to bring them up now, here, with the lights all around, and all the people and your family here.”

I said, “Please, senator, bring them all up. I would rather have them out here.”

That went on for three months. I didn't know what to do, so I went to see Senator Warren Rudman who most people would say is one of the most respected members of this body over the last 30 years. I said, “Senator Rudman, what can I do? A Democrat senator has, by himself, blocked my possibility to be the Education Secretary. I moved my family up here, I sold my house, my kids are in school, what do I do?” He said, “Keep your mouth shut.”

I said, “What do you mean, keep my mouth shut? This is unjust.”

He said, “Let me tell you a story. In 1976, President Ford nominated me to be on the Federal Communications Commission, and the Democrat senator from New Hampshire put a hold on my nomination.”

I said, “What happened?”

He said, “Well, I just swung there. Nobody knew what was going on. Pretty soon back in New Hampshire they were saying: What is wrong with Warren? Has he done something wrong? Did he beat his wife? Did he steal something? Why won't the Senate consider him and confirm him? After four or five months I was so embarrassed I just asked the president to withdraw my nomination.”

I said, “Is that the end of it?”

He said, “No, then I ran against the so-and-so who put a block on me, and I was elected to the Senate in his place.”

So that is how Warren Rudman got over being blocked.

Jeff Sessions, our distinguished colleague from Alabama, ran into a nearly similar situation. He was rejected by the committee. He was the U.S. attorney from Mobile, Alabama and the committee would not send his nomination to the floor. They held him up in the committee.

Senator Sessions got over that. He even got himself elected to the Senate. So Senator Rudman got over it, I got over it, Senator Sessions got over it. I didn’t like it, and I still don’t like it. But I got over it.

There are various ways to get over whatever grievous injustices were done to the Democrats before the distinguished senator from Texas, who is presiding, and I were elected to the Senate in 2002.

Senator Frist, the majority leader, has repeatedly offered to fix the problem I just described. He has said let all the nominees from a Democrat president or Republican president, let them eventually all come out of committee. He has said if there is not enough debate -- and I respect the idea of extended debate in the Senate -- let there be 100 hours of debate on every single nominee. Then Senator Frist has said, let there eventually be a vote, an up-or-down vote, as there has always been.

Now, it is not believable for my friends on the other side to suggest, as they are, that they are doing nothing new. They know they are. I will give one example. Everyone remembers the Senate debate about Clarence Thomas. Among other things, it made Dave Barry's career when he wrote columns about the Senate hearings. Everyone remembers those hearings. Everyone remembers how passionate they were and how much information came out. There was a new saga every day. No television drama approached it. There was never more passion in recent times in a Supreme Court nomination than when the first President Bush nominated Justice Clarence Thomas.

He was nominated in July of 1991 by President Bush. This Senate completed those hearings that were on television—that we all remember—and there was a vote in October of 1991, up or down . In that case, it was up, he was confirmed 52 to 48.

I have yet to find one single person who even remembers anyone suggesting 14 years ago that the Senate should not vote on Clarence Thomas. Everyone knew that after all the histrionics, all the debates—that the greatest deliberative body in the world would eventually vote.

So we are standing on the Senate floor conjuring up our own versions of history, inventing nuclear analogies, shouting at each other while gas prices go up and illegal immigrants run across our border. The Democrats are using the rules to block the president's nomination in a way they have never used before in 200 years. So we Republicans are now threatening to change the rules to prevent the Democrats from manipulating the rules in a way that has never occurred before. That is what this is all about.

I have a simple solution for the unnecessary pickle in which we find ourselves in this body. I offered it two years ago. I have offered it several times this year. This is it. I have pledged and I still pledge to give up my right to filibuster any president's nominee for the appellate courts, including the Supreme Court of the United States. If five more Republicans and six Democrats did that, there could be no filibuster and there would be no need for a rules change.

For the past two weeks, perhaps two dozen different Senators have flirted with variations of this formula. But they have not been successful because they have insisted on including exceptions. I hope these senators who are still having this discussion

succeed. I expect 80 percent of the Senate hopes they succeed. This oncoming train wreck is bad for the Senate, it is bad for the country, it is bad for the Democrats, and it is bad for the Republicans.

We look pretty silly lecturing Iraq on how to set up a government when we cannot agree on having an up-or-down vote on President Bush's judicial nominees. My suggestion is forget the exceptions. Twelve of us should just give up our right to filibuster, period. Let's do it. Let's get on with it. That ends the train wreck.

We have a war in Iraq. We have natural gas prices at $7 - these are record levels. We have highways to build. We have deficits to get under control. We have a health care system that needs transformation. We have judicial vacancies to fill.

I have said I will never filibuster a president's judicial nominees. I said it two years ago when John Kerry might have been president. For me, that meant then -- and it means today, and tomorrow -- that if a President Kerry or a President Clinton nominates some liberal I do not like, I may talk for a long time about it, I may vote against the person, but I will insist that we eventually vote up or down, as the Senate has for two centuries.

If 11 colleagues would join me in this simple solution, then we could get down to business, then we might look once again like the world's greatest deliberative body.

I say to the presiding officer, when you and I came to the Senate a little over two years ago, we talked about what our maiden addresses would be. We still call our first major speech our “maiden address.” I say to the presiding officer, remember, we were sitting next to each other in the front row, anxiously looking forward to hearing ourselves give our maiden addresses. I wanted to make mine about putting the teaching of American history and civics back in its rightful place in our schools so our children could grow up knowing what it means to be an American.

But as I sat here listening to the debate on Miguel Estrada, I was so surprised and so disappointed in what I heard that I found myself getting up one night and making a speech on Miguel Estrada, which I had no intention of doing.

During the debate, I was listening to this story of the American dream: this young man from Honduras coming here, speaking no English, going to Columbia, Harvard Law School, being in the Solicitor General’s Office. He is the kind of person who, when the presiding officer and I were in law school, and we would hear about people like that, we would say there are just a handful of people that talented, that able. We were envious, at least I was. He is exactly the kind of person who should have been nominated. Yet we could not even get a vote.

I thought about my time as governor of Tennessee for eight years. I appointed about 50 judges, and I remember what I looked for when I made those appointments. I looked for good character. I looked for good intelligence. I looked for good temperament. I looked for a good understanding of the law and for the duties of judges. And I especially looked to see if this nominee had an aspect of courtesy toward those who

might come before him or her on the bench. I appointed some Democrats. I appointed the first women appeals judges and the first African-American judges in Tennessee. I thought it was unethical and unnecessary for me to ask questions of those judges about how they might decide cases that might come before them.

I still feel the same way about the federal judges we nominate. I am distressed that we have turned this process into an election instead of a confirmation. It has become an election about the political issues instead of a confirmation about the character and intelligence and temperament of fair-minded men and women who might be placed on the bench.

I remember when I came to this body for the first time, not as a senator, but as a staff member to Howard Baker, later the majority leader. It was 1967. The ones worrying about protecting the minority's rights at that time were the Republicans. There were only 36 Republicans. I came back in 1977 to help Senator Baker set up his office when he was elected Republican leader, and there were only 38 Republicans. So most of us in this body understand that we may be in the minority one day. But that does not mean there should be an abuse of minority rights.

The best way I can think of to stay in the minority for any party, whether the Democratic Party or Republican Party, is to say what the senator from New York said in December in the Washington Post. He said that if the Republicans decide to change the rules to make sure the Senate continues the 200-year tradition of voting on the nominees the president sends to us, that it “would make the Senate look like a banana republic... and cause us to shut it down in every way."

Mr. President, shut down the Senate in every way? During a war? During illegal immigration? During a time of deficit spending, with a highway bill pending, with gas prices at record levels, with natural gas at $7? Shut the Senate down in every way?

I can promise you I know what the American people would think of that. Any group they can fix the responsibility on for shutting this body down and not doing its business will be in the minority or stay in the minority. Even now they are beginning to shut us down. We are not allowed to hold hearings in the afternoon because of objections by the other side. The American people need to know that. It is the wrong thing to do.

I had the privilege of hearing yesterday, when I was presiding, a very helpful speech by our leading historian in the Senate, Senator Byrd. He talked about how extended debate has always been a part of the Senate's tradition. I know that is true. I value that. I respect that. And I do not want the Senate to become like the House. I know that George Washington said, or is alleged to have said, that “we pour legislation into the senatorial saucer to cool it.” The House heats it up, and you pour it in a saucer to cool it in the Senate. But I do not ever remember George Washington saying it ought to stay in the saucer long enough to evaporate. I think he said just to cool it.

The Constitution and our Founding Fathers have made it very clear that they always intended for presidents' judicial nominees to be given an up-or-down vote. I have studied very carefully, and I will submit, in my full remarks to the Record, my

understanding of those founding documents. The language of article II, section 2, in the clause immediately before the nominations clause, for example, specifically calls for two-thirds of the Senate to concur, but in the nominations clause there is no such provision. I do not believe that is an inadvertent omission.

During the drafting of the Constitution, Roger Sherman of Connecticut argued at great length for the insertion of a comma instead of a semicolon at one point to make a section on congressional powers crystal clear.

Shortly after the Constitutional Convention, Justice Joseph Story, appointed to the Supreme Court by President James Madison, wrote his Commentaries on the Constitution, and he stated explicitly: "The president is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the Senate." This was Justice Joseph Story.

In some ways, what Members of the other side are doing would gradually erode the president's power to, in the words of our Founders, send to us "the object of his preference" for us then to consider. I trust the president, elected by a vote of the entire nation, to find the right men and women to send up here to be considered for judge or justice and sent back to him then to be appointed. Our advice and consent is in the middle of that process.

I suppose the Founders could have allowed the Congress to appoint the justices or the judges, but they did not. Gradually, however, the Senate has inserted itself more and more prominently in that process. I am not sure that the instances I know about suggest that if we were doing it all over again, we would trust the Senate to do a better job than our presidents, Democratic or Republican, in picking the men and women to serve on our courts.

Here is an example from my own experience. Back in the 1960s, I was a law clerk to the Honorable John Minor Wisdom of the Fifth Circuit Court of Appeals in New Orleans. Actually, I wasn't a law clerk; I was a messenger. He had already hired a Harvard law clerk, and he told me he could only pay me as a messenger, but if I would come, he would treat me as a law clerk. So I did. The reason I did it was because even at that time, 1965, Judge Wisdom was considered by my law professors at New York University Law School to be the leading civil rights judge in America and one of the finest appellate judges in America.

This is what I found when I got there. We were in the midst of school desegregation across the South. It was a time of great turmoil. Judge Wisdom, for example, ordered Mississippi to admit James Meredith to the University of Mississippi. And what was going on during that time was that the district judges across the South were basically upholding segregation and the Fifth Circuit appellate judges were overruling them and desegregating the South.

At that time, the Senate was not as intrusive in the appointment of judges as it is today because the president, President Eisenhower, only had to confer by custom with senators of his own party in the appointment of circuit judges. Well, he didn't have any

Republicans to confer with in the 1960s. All of the senators were Democrats. They approved district judges who, in case after case after case, upheld segregation. But President Eisenhower nominated for the appellate bench Republican judges, John Minor Wisdom, Elbert Tuttle for whom Senator Bond of Missouri was law clerk, and John R. Brown of Texas. Those three judges—who would have been blocked if the present policies of the Senate were in place, by senators from their home states—were able to preside over the peaceful desegregation of the South.

I have seen no evidence in history that the Senate's increased involvement in the co-appointment of appellate judges or justices improves the selection of those judges.

These are qualified men and women the President has sent here who deserve an up-or-down vote. I have mentioned Miguel Estrada. I have spoken about Charles Pickering, former judge, now retired, a graceful man who hasn't had a word of recrimination to say about what was done to him. He was battered for his record on civil rights when, in fact, he should have been given a medal for his record on civil rights for testifying against the founder of the White Knights of the Ku Klux Klan, who had been called America's most violent living racist in the middle of the 1960s; for putting his children in public schools at a time when many families in Mississippi were putting their children in segregated schools. He was a leader in civil rights, as well as a good judge.

And Bill Pryor's credentials on civil rights have been questioned. He was a law clerk, not a messenger, a law clerk to Judge John Minor Wisdom, who had enormous pride in Bill Pryor, who was elected attorney general of the state of Alabama and repeatedly has shown that he separated his conservative personal views from interpreting the law. He was going right down the line in following the Supreme Court in school prayer cases, abortion cases and reapportionment cases.

And Priscilla Owen, about whom we have been talking, graduated cum laude from Baylor Law School, justice of the Supreme Court of Texas, reelected to the Texas Supreme Court with 84 percent of the vote, has bipartisan support from other Texas Supreme Court justices. And Janice Rogers Brown, nine years on the California Supreme Court, appointed in 1996, the first African-American woman to sit on the court, approved by 76 percent of the voters.

Let me end my remarks where I began. Make your way through all the discussion, all of the analogies to nuclear war, and the issue before us is pretty simple -- shall we continue the two-century tradition of voting up or down on the president's judicial nominees? I believe we should. I have suggested a way we can remove ourselves from this pickle in which we find ourselves.

I have said, as I did two years ago, regardless of who is president, I will never vote to filibuster that president's judicial nominees. If five other Republicans and six other Democrats would say the same thing, we could then get on about our business of confirming or rejecting the president's nominees, of tackling the big deficits, passing the highway bill, trying to lower gas prices, spreading freedom around the world, supporting our troops in Iraq and Afghanistan and around the world, and in reestablishing ourselves,

in the eyes of America and the rest of the world, as truly the world's greatest deliberative body.

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